

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Carriage of the Transmissions )  
of Digital Television Broadcast Stations )

Amendment to Part 76 )  
of the Commission's Rules )

CS Docket No. 98-120

**REPLY COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION**

Submitted By

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**REPLY COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION**

1. The Cable Telecommunications Association, CATA, hereby submits its reply comments in the above-captioned proceeding. CATA is one of the two national trade associations representing the cable television industry. CATA's membership consists of cable television system owners and operators nationwide serving over 55 million cable television customers. CATA maintains that the Commission may not legally impose mandatory digital must carry rules during the transition from analog to digital broadcasting and that to do so would implicate the Fifth Amendment of the Constitution.

**Broadcasters Have Made No Case For Mandatory Must Carry of DTV Signals**

2. The television broadcast community has attempted to persuade the Commission of the inherently peculiar notion that television stations laboriously engineered specifically for the purpose of providing over-the-air transmission of digital television signals will not be successful unless the law directs that they be provided to the public through a closed transmission medium. Moreover, the broadcasters urge not merely that the newly allotted digital channels receive cable

carriage, but that they must be carried at the same time as the traditional analog signals during the nation's gradual transition from analog to digital broadcasting.

3. CATA does not choose to enter a policy debate over what is so obviously a parochial attempt by the broadcast community to create an artificial market for digital broadcast services. Neither we nor the broadcasters know what they want to do with the digital largess bestowed or, depending on one's point of view, inflicted upon them by the Commission. Neither we nor the broadcasters (and certainly not the Commission) knows when and whether the public will embrace the new medium. If the broadcasters have any business plan at all for the use of the new spectrum it seems to be to assure that cable television systems be required to carry digital signals at as early a date possible -- for the benefit of the elite who can afford digital receivers and who eschew the use of traditional broadcast antennas. There is simply not enough substance to this position to warrant further discussion.

4. Other arguments put forth by the broadcast community are irrelevant and similarly unworthy of debate. We note for instance the position of the NAB that carriage of digital signals during the transition period will not burden the channel capacity of cable systems because systems are greatly expanding their capacity with the addition of digital tiers. Not a bad argument if must carry channels could be carried on digital tiers, but quite irrelevant since it is the carriage of broadcast stations that defines the basic tier -- a tier which must be available to all subscribers on all television receivers and which, therefore, cannot be provided digitally unless all cable households are required to foot the bill for digital converters -- a hefty national subsidy that broadcasters know neither the cable industry nor its subscribers can bear.

5. CATA sees little reason to belabor the irrelevant or to engage in a rhetorical dispute over

the nature of digital television, whether it will succeed and the guise in which it will be presented to viewers. As in our comments in this proceeding we prefer to address the considerable legal issues facing the Commission should it desire to impose must carry regulations for digital signals during the transition period. In particular, we emphasize that the Commission lacks authority to mandate digital must carry rules during the transition period and that any attempt to do so would raise serious implications under the Fifth Amendment of the Constitution.

**The Commission May Not Legally Impose Digital Must Carry Requirements During The Transition Period.**

6. As CATA and others have pointed out, Section 614(b)(4)(B) of the Communications Act does not require the Commission to impose digital must carry regulations during the transition from analog to digital broadcasting. Rather, it only directs the Commission to initiate a proceeding to ensure cable carriage of digital broadcast signals of local commercial television stations after they have changed to conform with digital standards. Although we believe the plain reading of the statute is clear, certainly the Commission must agree that the statute is, at best, ambiguous. Indeed, as Chairman Kennard himself has explained:

...if the statute were unambiguous and clear, we wouldn't be having this discussion. We wouldn't be having a comprehensive proceeding. ("Kennard Muses Over Full Digital Must-Carry," Multichannel News, November 30, 1998, p.6

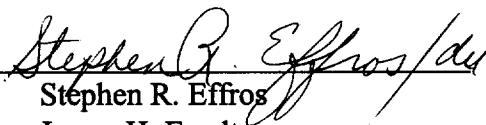
Therein lies the rub. The imposition of digital must carry rules at any time would constitute a "taking" of cable operators' property. Even if such a taking were for a legitimate public purpose, without compensation the taking would violate the Fifth Amendment. By choosing an interpretation of Section 614(b)(4)(B) that permits it to impose digital must carry rules at this time, the Commission would be subjecting the federal government to claims for compensation in

the Court of Claims under the Tucker Act. But, as the *Bell Atlantic* case made clear, the Commission may not legally interpret a statute in a manner that would create a class of claimants, because the Commission may not obligate the federal government to spend without explicit congressional authorization, and, certainly, no one can argue that Section 614(b)(4)(B) provides such authorization.<sup>1</sup> Absent clear direction from Congress, (which it most certainly does not have) the Commission cannot take actions that create a class of claimants under the Tucker Act. Thus, the Commission lacks the power to impose digital must carry rules during the transition period.

7. For the reasons stated herein, CATA again urges the Commission not to entertain requirements for the mandatory carriage of DTV channels by cable television systems during the transition from analog to digital broadcasting.

Respectfully submitted,

CABLE TELECOMMUNICATIONS  
ASSOCIATION

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<sup>1</sup> Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994)